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IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1974
No. 73-1769

CARL THOMPSON,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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The petitioner, Carl Thompson, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on March 12, 1974, affirming his conviction and the order of that Honorable Court entered on April 24, 1974, denying his petition for rehearing.

CITATIONS TO OPINIONS BELOW

The opinion and order of the Court of Appeals are not reported and appear in the Appendix attached hereto as Appendix A and B, respectively. No opinion was rendered by the United States District Court for the Central District of California.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit affirming the judgment of conviction in the criminal proceeding below was filed on March 12, 1974. A timely Petition for Rehearing was denied on April 24, 1974. This petition for certiorari is filed within thirty days of that last date. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

Whether the refusal of the Government, after appropriate demand and offer by the defense, to record the Grand Jury proceedings required that the District Court, upon timely motion, dismiss the indictment.

CONSTITUTIONAL PROVISIONS

The Constitutional provision involved is the Fifth Amendment to the United States Constitution. It is printed in I.U.S.C. XLVI.

STATEMENT OF THE CASE

Petitioner, Carl Thompson, together with four codefendants, were indicted by the Grand Jury on July 14, 1971 for one count of conspiracy to commit marijuana offenses in violation of Title 21, United States Code, Section 176(a) (C.T. 1-4). He pled not guilty (C.T. 6) and moved to dismiss the indictment for failure by the government to record Grand Jury testimony (C.T. 22-35), which motion was denied (C.T. 108). The case then proceeded to trial before a jury as to petitioner Thompson and one remaining co-defendant (C.T. 152), both of whom were found guilty as charged (C.T. 213, 216). Petitioner Thompson's motion for a new trial and judgment of acquittal was denied (C.T. 223-226, 229-232, 247, 262, 273), and he was ultimately sentenced to five years imprisonment. Petitioner

then filed a timely notice of appeal (C.T. 277), and was admitted to bail pending appeal in the amount of $35,000.00 (C.T. 303). Petitioner is presently at liberty upon said bail, pending filing, consideration, and disposition by this Honorable Court of the instant petition for writ of certiorari.

REASONS FOR GRANTING THE WRIT

I

The Decision Below Is In Direct Conflict With Other Decisions of The Ninth Circuit Court of Appeals Concerning Grand Jury Recordation and Operates to Deprive Defendants of Due Process of Laws.

DISCUSSION

While a reading of the Reporter's Transcript of the proceedings in the Court below reveals that certain Grand Jury Transcripts were made available to defense counsel for the purpose of cross examination, a careful reading of the record below clearly establishes that when the Grand Jury indicted petitioner no reporter was

present and consequently it is presently unknown what specific testimony was presented to that specific Grand Jury and upon what evidence that specific Grand Jury relied in returning that indictment.

The Grand Jury testimony, portions of which were given to defense counsel prior to cross-examination, were of ancient vintage. In all likelihood that testimony had been originally presented to an earlier and different Grand Jury than the specific Grand Jury which ultimately indicted the petitioner. The specific Grand Jury which ultimately indicted the petitioner may have had before it only the testimony of a Government agent who testified only as to the contents of the prior testimony given before one or more prior Grand Juries, and this testimony of that agent may well have been selective only of the information which was of aid to the prosecution, with the deletion of testimony which might have been favorable to the defense.

All of these frailties flow, of course, from the refusal of the office of the United States Attorney to record the specific testimony presented to the specific

Grand Jury which ultimately indicted petitioner.

The opinion of the Ninth Circuit however failed to recognize the existence of this problem when it stated that "Given the presence here of substantial direct evidence before the Grand Jury, such a showing [of abuse of discretion of the trial court in failing to dismiss an indictment procured partially by incompetent evidence] has not been made." The fault of this reasoning is that there is nothing in the record to support any finding that substantially direct evidence was placed before the Grand Jury which indicted petitioner, and indeed no such finding can ever be made because that testimony, although requested to be recorded, was never recorded.

The opinion of that Court, sought to be reviewed here, simply fails to realize that failure to record as required by United States v. Thoresen (9th Cir. 1970) 428 F.2d 654 and United States v. Price (9th Cir. 1973) 474 F.2d 1223, should not be permitted to shield the likelihood of selective hearsay testimony, which would constitute error under United States v. Arcuri (2nd Cir.

1969) 405 F.2d 691 or prevent the possibility of defense ever meeting the requirements of United States v. Fox (9th Cir. 1970) 425 F.2d 996.

It should be noted here and it cannot be overemphasized that the Government in its formal opposition to the Motion to Dismiss the indictment (C.T. 73-76) apparently conceded that no Court Reporter was present when testimony was given before the specific Grand Jury which indicted the petitioner.

ARGUMENT

In Dennis v. United States (1966) 384 U.S. 855, this Honorable Court was confronted with the issue whether it was reversible error under the circumstances there present for the trial court to deny a defense motion for production of the Grand Jury testimony of four Government witnesses. The Court in upholding the contention noted preliminarily that in United States v. Proctor & Gamble Co., 356 U.S. 677, it stated that "'problems concerning the use of the Grand Jury transcript at

the trial to impeach a witness, to refresh his recollection, to test his credibility ****' are 'cases of particularized need where the secrecy of the proceedings is lifted discretely and limitedly.'" (384 U.S. at 871). Emphasizing that "disclosure, rather than suppression, of relevant material ordinarily promotes the proper administration of criminal justice" the Court ruled that the showing made by the defendants of the following circumstances was substantially beyond the minimum requirements of a "particularized need":

> "1. The events as to which the testimony in question related occurred between 1948 and 1955. The grand jury testimony was taken in 1956, while these events were relatively fresh. The trial testimony which petitioners seek to compare with the 1956 grand jury testimony was not taken until 1963. Certainly, there was reason to assay the latter testimony, some of which is 15 years after the event against the much fresher testimony before the grand jury.

"2. The motions in question involved the testimony of four of the eight government witnesses. They were key witnesses. The charge could not be proved on the basis of evidence exclusive of that here involved.

"3. The testimony of the four witnesses concerned conversations and oral statements made in meetings. It was largely uncorroborated. Where the question of guilt or innocence may turn on exactly what was said, the defense is clearly entitled to all relevant aid which is reasonably available to ascertain the precise substance of the statements.

"4. Two of the witnesses were accomplices, one of these being also a paid informer. A third had separated from the union and had reasons for hostility toward petitioners.

"5. One witness admitted on cross examination that he had in earlier statements been mistaken about significant dates."

Holding that the above showing entitled the defendants to disclosure and at a time when those witnesses were available for cross examining, the convictions were reversed.

That Dennis may have had a greater impact than the narrow question there resolved was later intimated by the Ninth Circuit in United States v. Thoresen (9th Cir. 1970) 428 F.2d 654. There the defendants, expecting to be reindicted, served on the United States Attorney a demand letter stating that the defendants would seek a transcript of any future grand jury proceeding, requesting that a court reporter should therefore be in attendance, and offering to pay the expense of such. At the same time, the defendants moved for a court order compelling the same, which order was denied on the basis that the defendants were not entitled to a grand jury transcript as a matter of right. Defendants were thereafter reindicted following grand jury proceedings without a reporter, and defendants subsequent motion for a transcript of said proceedings was denied for the reason that as no reporter

had been present, it would not be possible to provide such a transcript.

In this procedural context the Ninth Circuit gave notice of what might be in store in the future, as follows:

> "The rule prevailing in the Ninth Circuit is that the recording or transcribing of grand jury testimony is 'permissive, not mandatory.' Loux v. United States, 389 F.2d 911, 916 (9th Cir. 1968). See also Reyes v. United States, 417 F.2d 916, 918 (9th Cir. 1969); Jack v. United States, 409 F.2d 522, 524 (9th Cir. 1969). But the fact that a particular discovery procedure is 'permissive' rather than 'mandatory' does not mean that permission may be arbitrarily denied. Where a defendant, anticipating future grand jury proceedings involving himself, gives notice in advance that he will seek a transcript of the proceedings if an indictment is returned and offers to pay the expense of having a reporter in attendance or shows

inability to pay, a sound exercise of discretion would ordinarily call for the granting of a motion that a reporter be in attendance.

"However, we are unaware of any precedent in this Circuit for the dismissal of an indictment because of the Government's refusal to honor an advance request that a court reporter be present. We are therefore unwilling to invoke such a rule in this case absent a clear indication of prejudice, although we can give no assurance that such a rule may not be applied under similar circumstances in the future. We do not believe that there is here a clear indication of prejudice to defendants resulting from the unavailability of the grand jury transcript which they sought."

That notice came to fruition in United States v. Price (9th Cir. 1973) 474 F.2d 1223. There, prior to indictment, appellants moved for an order compelling recordation of the anticipated grand jury proceedings which motion was denied. The

response of the Court of Appeals was as follows:

> "We adhere to the principles stated in Thoresen, and we now implement them by holding that the district court must exercise its discretion in passing upon a preindictment motion for recordation of grand jury proceedings and that a district court abuses its discretion in denying the motion of parties situated as were appellants, in absence of a Government showing that it has a legitimate and compelling interest to be served by nonrecordation. The Government cannot meet its burden by resort to the secrecy rubric. Secrecy of grand jury proceedings is not jeopardized by recordation. The making of a record cannot be equated with disclosure of its contents, and disclosure is controlled by other means.
>
> "Our holding, in part, is predicated on our recognition in Thoresen that recordation of grand

jury proceedings should be routine and nonrecordation should be permissible only in exceptional circumstances. It is also based on our awareness that a less strict rule invites defeat of the principles enunciated in Dennis v. United States (1966) 384 U.S. 855, 86 S.Ct. 1840, 16 L.Ed.2d 973.

"Dennis held that it was reversible error to deny petitioners' motion for disclosure of certain portions of a grand jury transcript for which the petitioners had shown a particularized need. The Court reasoned that the broadened discovery available to defendants is 'entirely consonant with the growing realization that disclosure, rather than suppression, of relevant materials ordinarily promotes the proper administration of criminal justice.' (384 U.S. at 870, 86 S.Ct. at 1849. See also U.S. Industries, Inc. v. United States District Court (9th Cir. 1965) 345 F.2d 18.)

"When Price and Coffey moved for disclosure of portions of the grand jury proceedings, their showing of particularized need may not have been adequate. However, even if their showing had been overwhelming, it would have been futile because the nonexistent is nonproducible, and the Government had arranged that no record be made.

"Government has known at least since Thoresen that a failure to record grand jury proceedings after notice that a defendant wants recordation could jeopardize a prosecution. In Thoresen we declined to dismiss the indictment because the Government had had no prior Circuit warning that its refusal to record could bring its case to grief. The warning was given, and it has been ignored. We are unwilling to go so far as to order dismissal of the indictments of Price and Coffey because we are not convinced that they adequately demonstrated prejudice. (428 F.2d

at 666.) However, we will vacate their sentences and on remand permit them a further opportunity to expand the record by offering additional evidence bearing on the issue."

Price parallels the instant proceeding in all material respects. Here defense counsel authorized by defendant Thompson informed the office of the United States Attorney on April 9, 1971, and April 12, 1971, that in view of the then upcoming grand jury proceeding it was demanded that all grand jury proceedings related to Mr. Thompson be transcribed by a stenographic reporter and that, in connection therewith, the defense would pay said reporter's fees or supply a reporter at its own expense (C.T. 22-35). The offer was expressly made a continuing offer (C.T. 22-35). As stated by counsel in said communication, the rationale of the request was that:

"It is the policy of the United States Attorney to not record the testimony of Federal or State law enforcement officers, even though

a stenographer and funds therefor are available, for the reasons that the United States Attorney does not wish to make such testimony available by discovery proceeding, or at the time of trial as impeaching evidence, or as the basis of a motion to dismiss the indictment based upon false, misleading hearsay or incompetent testimony by such law enforcement officers. The testimony of such witnesses is usually hearsay and the Grand Jury is not made aware that precipient witnesses are available to testify on these same subjects.

"In this particular case, I have reason to believe that several informant witnesses of doubtful character and veracity may be questioned by your office before the Grand Jury in regard to Mr. Thompson. It is therefore imperative that the testimony of all persons who testify before the Grand Jury regarding Mr. Thompson from this day forth be preserved."

The offer was rejected, however, and testimony was given before the Grand Jury without recordation which testimony was the basis of the indictment returned. This is the precise evil at which both Thoresen and Price were directed and defendant here is entitled to the benefit of the rule therein proposed to the effect that the Government's refusal to honor an advance request that a court reporter be present at the Grand Jury proceeding, without expense to the Government, should result in a dismissal of the indictment.

That this is the proper result in the instant case is likewise supported by the reasoning of the Ninth Circuit in Lenske v. United States (9th Cir. 1967) 383 F.2d 20, 24, 25, concerning the practice, employed by the Government in the case at bench, of not having the testimony of law enforcement officers before the Grand Jury transcribed by a court reporter:

> "Another incident of the trial will be commented on because it seems to us to have been particularly offensive. The defendant's counsel, having observed that the

prosecuting attorney held paper writings in his hand when he, at the trial, examined witnesses who had testified before the Grand Jury, correctly surmised that the writings were transcripts of the witnesses' testimony before the Grand Jury. Thereupon the defendant's counsel requested a copy of the Special Agent's testimony before the Grand Jury, for use in cross examining the Special Agent, who was, and was to be, the Government's principal witness. Government counsel said that he had not been present when the Special Agent testified before the Grand Jury; that there was no transcript; that none had been made up; that it was his belief that the Special Agent's remarks were not even transcribed, hence it would be a physical impossibility to supply a transcript. The Court directed Government counsel to check the record. Later Government counsel stated that of 16 Grand Jury witnesses whose testimony was transcribed, 12 had testified at the trial; that the

testimony of the Special Agent and the Revenue Agent was not transcribed.

"Whether Government counsel meant that no shorthand notes had been made of the Special Agent's Grand Jury testimony, or that such notes were taken and had not been typed up, it is evident that the Government so arranged matters that there would be available transcripts by which neutral witnesses could be held to their Grand Jury testimony and checked if they varied from it, while as to Government partisan witnesses, who presented no danger of their being swayed from their recitals, there would be no writing which the taxpayer might use for cross-examination. It was a clever scheme, but one sided and unfair, and in complete violation of the teachings of Holland v. United States, supra." (emphasis added).

This practice of the United States Attorney in not having the testimony of law enforcement officers before the Grand

Jury transcribed, for the reasons set forth in the Motion to Dismiss below, denied the defendants their constitutional right to indictment by a Grand Jury, the effective aid of counsel, due process of law, and a fair trial. See also United States v. Gramoline, 301 F. Supp. 39, (R.I. 1969), and cases cited therein. The above described procedure is likewise a denial of fundamental basic due process and should not be tolerated by the Court. See United States v. Thoresen, 428 F.2d 654, 666-670 (9th Cir. 1970).

It is further submitted that the practice of the United States Attorney in using hearsay evidence to indict a defendant when direct evidence is available should not be tolerated by this Court for two reasons:

First, it habituates the Grand Jury to rely upon evidence which appears smooth, well integrated, and consistent in all respects. Thus, the Grand Jury may be unable to distinguish between prosecutions which are strong and those which are relatively weak.

Secondly, a defendant at trial may be, and in this case the defendants were confronted with testimony from witnesses who did not testify before the Grand Jury that returned the indictment, and thus, a defendant is foreclosed from exploring Grand Jury testimony for statements inconsistent with trial testimony. This highly reasonable and rational requirement that the United States Attorney not rely upon hearsay evidence when direct evidence is available was a recent holding of the Second Circuit Court of Appeals in United States v. Arcuri, 405 F.2d 691, 964 (2nd Cir. 1968). In the absence thereof, the function of the Grand Jury below was to act as a mere rubber stamp for the office of the United States Attorney, a function this Honorable Court should not condone.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and orders of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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